IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 75 of 1982

PRITHVI SINGH & ANR.
V/S
HINDUSTAN REDIATOR COMPANY

Mr. OP PUNGALIYA for TRILOK R RATHI, for the appellant / petitioner

Mr. VIKAS BALIA, for the respondents.

Date of Order : 3.7.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This second appeal has been filed by the plaintiff, against the judgment and decree of the learned lower Appellate Court dt. 28.1.1982, whereby the decree passed by the learned trial court has been modified, in the manner, that the decree permitting the plaintiff to undertake maintenance and cleaning operations of sanitary tank, and Cess Pool has been maintained, but then, the decree of the learned trial court permitting the plaintiff to take water connection in the reservoir and carrying the water upstairs has been set aside.

At the commencement of the arguments it was informed by the learned counsel for the parties, that one of the plaintiff appellant being Shri Prithvi Singh has expired. Learned counsel for the appellant informed to be

not aware as to when did the appellant die. However, learned counsel for the respondents informed, that the appellant Prithvi Singh has died long long back, and since no steps have been taken for substitution of his legal representatives, the appeal abates. To this, learned counsel for the appellant submitted, that since one of his heirs, being Gulab Singh is already appellant no. 2, the appeal does not abate. In that view of the matter, the matter was heard on merits.

The facts are, that the plaintiff filed a suit for injunction, against the three defendants, alleging inter alia, that the plaintiffs own building described in para-1 of the plaint. In this building one entrance is towards North, and the other is towards West in the street, and ground floor thereof, excluding western shop, is in the tenancy of defendant no.1, who had sublet it to defendant nos. 2 and 3. It is then alleged, that on the first and second floor of the building two hotels in the name of Prithvi Hotel and Central Lodge are functioning, and that, in place of Prthvi Hotel, earlier, Grand Hotel was functioning. This portion of Grand Hotel was in the tenancy of Girdharilal Kakkar, and on his death with his legal representatives. However, after undertaking the litigation, the plaintiff got possession of that premises in December, 1976, by which time the water connection was already cut. It is then alleged, that for supply of water to this Prthvi

Hotel portion one reservoir is constructed in the ground floor, which had been constructed since inception, and therefrom only the water is supplied to the whole building with the assistance of electric motor and pump, whereby it is carried to the reservoir on the top floor, and therefrom, it is supplied to the whole building. It is then alleged, that the defendant no.1, after being inducted as tenant, obtained another water connection, and the arrangement for water supply in the Prithvi Hotel portion continued as it existed hitherto-fore. It was alleged that pipe line was installed in the western lane, so as to make the water reach to the reservoir. It is then alleged that suits for eviction, and for fixation of standard rent are already pending between the parties. With these facts it is alleged, that the plaintiff applied for taking water connection through this pipe line installed in the western side, and when the authorities went to install the connection, the defendants no. 1, 2 and 3 obstructed, while the plaintiff is entitled to obtain water connection, so as to make the water reach to the reservoir, as it was used earlier. Then, allegations have been made regarding Sanitary line, Cess Pool, and sewerage line, which are in operation, but that part of the decree having been maintained by the learned lower Appellate Court, is not under challenge, and therefore I need not detain myself on that.

In the written statement the case set up is, that the defendant no. 1 was permitted to sublet the premises. Then, it was alleged in para-4, that at the time when the defendant no.1 took the premises on rent the reservoir did exist, and an electric motor was also lying, but then, the electric motor, booster etc. were all out of order, and the water connection was already cut. Thus, neither any water was filled in the reservoir, nor was it boosted upstairs, and that, right from the date when the defendant no.1 was inducted as tenant, this reservoir was never used. It is then alleged, that the plaintiffs have already taken two water connections in the building, and thereby the water is carried to the third floor. It was maintained, that when the defendant no.1 took premises on rent, there was no water connection at all. Thus, the plaintiff is not entitled to any relief in this regard.

The learned trial court framed issues no. 1, 2 and 4 in this regard.

After trial the learned trial court decreed the suit as above. Deciding issue no.1 it was held, that the system/arrangement as pleaded by the plaintiff continued upto 1976, as the evidence on the side of the plaintiff is more reliable, as compared to the defendant, and therefore, issue no. 1 was decided in favour of the plaintiff. Then, deciding issue no.2 it was found that the reservoir and

booster did exist, and simply because, for some reasons it remained out of order for some time, the defendant is not entitled to obstruct the plaintiff's right to use the instruments in the positive manner. It was also found, that in view of the existence of reservoir, booster and the pipe line etc., it is the duty of the defendant not to obstruct its using, and it gives rise to obligation in favour of the plaintiff, entitling the plaintiff to get injunction.

The learned lower Appellate Court has set aside this finding. The learned lower Appellate Court has found, that the existence of reservoir is not in dispute, but then the question is, as to whether the plaintiff is entitled to carry water on the upper storey from this reservoir, and it was found, that there is nothing to show, that at the time when the defendant was inducted as tenant, any such right was reserved by the plaintiff, and no legal obligation has been disclosed in the plaint, in favour of the plaintiff, against the defendant, except alleging, that the water was being carried upto the year 1976, which averment has been denied by the defendant, and the positive stand has been taken in para-10 of the written statement, that the plaintiff has no such right. Then, discussing the oral evidence of the parties, it was found, that the plaintiff has failed to prove, as to, up to which year the connection survived, which could very well be proved by calling the persons from Water Works Department. The Commissioner's

report was then pressed into service. However, in that regard it was observed, that the report has not been tendered in evidence, nor the Commissioner has been examined, apart from the fact, that the report was prepared in miscellaneous proceedings. That apart, that report shows that the reservoir exists, and there is a pipe for carrying water upstairs, but then, that does not throw any light on the question, as to whether the connection was surviving or not at the time when the defendant no.1 was inducted as tenant. Inter alia with these findings the learned Judge also considered the aspect of convenience, i.e. the number of inmates in the building, and the finding was set aside.

The appeal was admitted on 13.7.1982 framing the following substantial question of law:-

> "Whether the first appellate Court was justified in refusing the injunction prayed for by the plaintiffs for supply of water from the tank in the ground floor for use in the upper stories, merely for the reason that the plaintiffs did not avail of the facility at the time when the premises on the ground floor were let out to the defendants?"

It was contended by the learned counsel for the appellant, that since the plaintiff is the owner of the property, is entitled to use it properly, and for so using, the reservoir in question, is the only source of adequate supply of water, he has inherent right to use the reservoir.

Learned counsel for the respondents, on the other hand submitted, that the plaintiff has already taken other water connection, and has not been able to establish any legal right, so as to compel the defendants to allow the appellant to use the reservoir, obviously, by interfering in the possession of the defendant.

I have heard learned counsel for the parties, and have gone through the record, and have also gone through the evidence available on record. It is a different story, that the evidence of the parties, on the question of existence of live water connection, at the time of letting out the premises to defendant no.1, is a matter, which rests in the realm of oath against oath. But then, that aspect need not detain me any longer, in view of the substantial questions of law framed in this regard. The question has already been quoted above, which proceeds with the assumption, that the facility was not being availed, at the time, when the ground floor was let out to the defendant. Thus, on the face of this question, it is clear, that the plaintiff was not availing this facility at the time when the defendant no.1 was inducted as tenant.

The question then is, as to whether, in these circumstances, the plaintiff is entitled to injunction, restraining the defendant, from interfering with the

plaintiff, taking water connection for supply in reservoir, and then carrying it on the upper stories.

In my view, when admittedly ground floor has been let out to the defendant no.1, and no rent note has been produced on record, apart from the question as to whether it was executed or not, there is no evidence on the part of the plaintiff, even oral, to the effect, that at the time of induction of the defendant no.1, as tenant, it was ever agreed between the parties, that the tenancy will be with this obligation, and the plaintiff shall be allowed to, continue to use the reservoir, keep the water connection alive, and carry the water upstairs. It was sought to be contended, that even the defendant no.1 itself was getting water from the water reservoir, carried to the upstairs stories, but then, from the averments of the plaint, this aspect is negatived, when it is pleaded in para-4 of the plaint, that after being inducted as tenant, the defendant no.1 took fresh water connection. If the reservoir were in use, and the defendant no.1 was to get water therefrom, as alleged by the plaintiff, from the water being carried to the upper stories, from the reservoir, obviously, there was no occasion for the defendant no. 1 to obtain fresh water connection. This obviously shows, that at the time when the defendant no.1 was inducted, the reservoir and the electric motor, boosters etc. were out of use. True it is, that the plaintiff has also produced the witnesses, who have tried

to depose, that after the defendant no.1 was inducted, the reservoir and boosters etc. were functional. In my view, in the totality of circumstances, more so on the face of the aforesaid pleading of para-4 of the plaint, it cannot be believed, that the things were functional at that time.

That being the position, simply because in the premises let out to the defendant no.1, even if some reservoir existed, and non functional, electric motor, and pump were lying, in absence of anything positive, to show, that the plaintiff reserved its right to use the reservoir, and the pump etc. for carrying water upstairs, it cannot be said, that the plaintiff retains any inherent right. No legal authority has been shown by the learned counsel for the appellant, which may show, much less establish, existence of such right in favour of the plaintiff.

The net conclusion of the aforesaid discussion is, that the substantial question of law framed, is answered against the appellant. It is held, that the learned lower Appellate Court was justified in refusing the injunction prayed for by the plaintiff, regarding the user of reservoir, for supply of water therefrom, for use in the upper stories.

The appeal thus is devoid of merit and is, therefore, dismissed. The parties shall bear their own costs.

(N P GUPTA),J.

/Sushil/